



Freedom of Information and Members' correspondence with Public Authorities

Background

1. Some Members have expressed concern about the treatment, under the provisions of the Freedom of Information Act 2000 (the Act), of their correspondence with public authorities, where copies have been retained by the authority. This note briefly sets out the principal provisions of the Act, describes how these apply to Members' correspondence and provides information about any exemptions to the general right of access that might apply. Information is also provided about the guidance, support and advice available for Members on these matters. The note deals primarily with correspondence about constituents and constituency business.

Summary of main points

- Members' correspondence (written and electronic) with public authorities falls within the scope of the Freedom of Information Act.
- Public authorities may be required to release a copy of Members' correspondence if it receives a relevant request.
- Public authorities should consult the Member before making a decision about disclosure.
- The Information Commissioner has issued guidance to public authorities stating that if a Member has written to a public authority passing on information from or relating to a constituent, the presumption should be that the information is not disclosed.
- Members are not individually subject to Freedom of Information (FoI) and are therefore not required to apply the Act to any request for information which is addressed to them.

Support and advice for Members

2. Support and advice to Members in their dealings with public authorities where their correspondence is the subject of a FOI request is available from the House of Commons Information Rights and Information Security Service (IRIS). This includes:
 - drafting of standard paragraphs for inclusion in correspondence with public authorities;
 - provision of assistance to Members in their dealings with public authorities and the Information Commissioner;
 - the same team can also provide advice and guidance on the Data Protection Act. **Contact the IRIS Team on x2032.**
3. Published guidance on the application of the Act to Members' correspondence is also available from the Information Commissioner. Further information, including a copy of the Commissioner's guidance is available on our web pages:
www.parliament.uk/site_information/foi/foi_general/commons_foi/commons_foi_guidance.cfm.

The operation of the Act

4. The Act applies to all recorded information held by English, Welsh and Northern Irish 'public authorities'. Public authorities are, broadly speaking, public bodies which exercise public functions, such as central government departments, local government, the police, the health service, the education service and their related offices and agencies.
5. There is separate legislation covering Scottish public bodies, made by the Scottish Parliament. UK public bodies operating in Scotland continue to be covered by the 2000 Freedom of Information legislation.

6. The right of access to information conferred by the Act may be exercised by anyone, including, but not restricted to, people living abroad, non-UK citizens, journalists, political parties, lobby groups and commercial organisations. Once information is provided in response to a request under the Act it is considered to be available generally to the public as well as to the particular person requesting it. In other words information should not be released to a particular requester if the authority would not be prepared to release to any requester.
7. Separate data protection legislation protecting the use and disclosure of personal information by both public and private bodies continues to apply and there is a complex interaction between the two regimes. A Member's correspondence may contain data which is personal to the Member and also data which is personal to the constituent. The Department or authority concerned will have to consider both these aspects of it.

The Act and Members of Parliament

8. Members of Parliament and political parties are **not** public bodies for the purposes of the Act and therefore do not have to apply its provisions to any written requests for information that they themselves receive. However, Members communicate with a range of public bodies that are covered by the Act. Information which is passed to these bodies, and that the bodies retain, might be subject to a FoI request.
9. The Act applies not only to central and local government, but also to independent public bodies such as the Electoral Commission and the BBC, GP surgeries and individual schools. Individual councillors are likely to be considered as part of the authority as a public body, since local authorities are executive bodies, so information held by local councillors may well fall within the scope of FoI. Thus, for example, a written request from a mobile phone company to a local authority asking for copies of correspondence with the local Member and councillor about the siting of a phone mast would come within the ambit of the Act as would correspondence about a constituent's complaints or circumstances.
10. In order to reduce the risk of future disclosures of personal information about a constituent, Members could consider anonymising any information they send to a public authority if it is not essential for the recipient to know the identity of the person prompting the inquiry in order to be able to help.

Defamation

11. Section 79 of the Act protects the public authority from libel proceedings where the information it releases to an applicant under the Act includes a defamatory statement. This protection is subject to the defamatory statement having been provided to the authority by a third party and applies only if the disclosure is not malicious. Where the defamatory statement disclosed by the authority was sent to it by a Member, that Member's communication of it to the authority will in most cases have been covered by qualified privilege. This will not be affected by the further publication of the statement under the Act provided that the Member does not expressly authorise its publication.

Assumption of confidentiality

12. The Information Commissioner has published guidance for public authorities that states that when dealing with requests for correspondence, it is vital for them to protect the personal details of, or other confidential information passed on by, constituents to their Members. He also concludes that if a Member has written to a public authority passing on information from or relating to a constituent, the presumption should be that the information is not disclosed and that information is likely to be exempt under one or more specific exemptions.

Relevant exemptions

13. In practice any written request for information held by a public authority could be categorised as a FOI request and the request must be complied with, unless one or more of the exemptions in the Act are relevant. These exemptions, which can only be applied by the public authority holding the information, are set out in Part II of the Act. Most of the exemptions are qualified by the need to undertake a public interest test which states that the requirement to provide the information does not apply if:

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

The remaining exemptions are absolute and the public interest test does not apply.

14. There is no class exemption covering correspondence from Members to public authorities. Such cases must be dealt with on an individual basis. When public authorities consider requests for information involving an authority's correspondence with Members, the operation of certain exemptions is likely to attract particular attention. In the case of information about constituents the most relevant and important exemptions are likely to be section 40, which protects personal information, and section 41 which protects information provided in confidence

Section 40: Personal Information

15. Section 40 is an absolute exemption that protects personal data, linking with the Data Protection Act 1998. Information must not be released where to do so would breach any of the data protection principles. Particular consideration should be given to whether release of the information would be fair and lawful (the first data protection principle).
16. Where a Member's letter contains personal data about him or herself or about a constituent, it will generally be unfair to release that information. Release would be likely to be a breach of the first data protection principle. Where the information relates to the Member rather than to a constituent, the Member should consider whether there are particular reasons why the information should not be made available to the public and if there are, should make this clear to the public authority.

Section 41: Information Provided in Confidence

17. Where information covered by a request contains confidential information, passed on by a constituent, it is likely that section 41 should be used to protect the information. This is an absolute exemption.
18. The relationship between Members and their constituents does not have the same legal recognition as the confidential relationship as a doctor and patient or lawyer and client. However, Members often assure constituents that their dealings with them are confidential and there is usually in any event a legitimate expectation by the constituent that information disclosed in their dealings with their Member will be treated as confidential. This means that letters sent on behalf of a constituent may be subject to a duty of confidence.
19. Where a FOI request is made for this information, the public authority will have to consider whether the constituent, the Member or anybody else would be able to bring an action against the public authority for breaching confidence if the contents of their letter were released.

Other exemptions that might apply include:

Section 30: Investigations and Proceedings Conducted By Public Authorities

Section 31: Law Enforcement

20. Sections 30 and 31 are qualified exemptions for information relating to investigations and law enforcement. Members can receive information from constituents about alleged criminal activity or other misconduct, which they then pass onto the relevant authority. There are likely to be significant public interest arguments against disclosing such information, but these always have to be balanced with the public interest factors in favour of disclosure.

Section 34: Parliamentary Privilege

21. Section 34 applies to information whose exemption is required in order to avoid an infringement of the privileges of either House of Parliament. The purpose of section 34 is to preserve parliamentary privilege and protect the position of Parliament. *Please note that in the case of Members' correspondence this exemption can only be applied if the correspondence specifically relates to the proceedings of either House or of a formally constituted committee of either House.* This is an absolute exemption.

Section 35: Formulation of Government Policy, etc

22. Section 35 is a qualified exemption applying to information held by government which relates to the formulation of government policy. This could apply, for example, to information sent by a Member to a government department to illustrate a current policy issue.

Section 36: Prejudice to Effective Conduct of Public Affairs

23. Section 36 is a qualified exemption which can be applied if the release of information would have a prejudicial effect on the conduct of the public authority's affairs.

Section 38: Health And Safety

24. Section 38 is a qualified exemption which applies to information whose disclosure would be likely to endanger the physical or mental health or the safety of any individual.

Section 43: Commercial Interests

25. Section 43 is a qualified exemption which covers trade secrets and information when disclosure would damage the business interests or financial position of any person. For example, if a Member was writing to a public authority with information supplied by a business, releasing the information might give their competitors an unfair advantage.

The requirement to consult

26. The Secretary of State has issued a code of practice giving guidance to public authorities about how to apply the Act. Amongst other provisions, this makes recommendations about the steps to take where:
- "... requests for information may relate to persons other than the applicant and the authority; or disclosure of information is likely to affect the interests of persons other than the applicant or the authority."*
27. The Commissioner's guidance makes it clear that in all cases public authorities should consult the Members concerned when information about their correspondence has been requested under the Act. The Member may in turn want to consult their constituent. The guidance also states that public authority should not contact the constituent directly unless the Member suggests this would be appropriate. This consultation is important so that
- the Member is aware that a request has been made; and
 - the Member can, where it may not be apparent from the correspondence, give the public authority information about the correspondence and the potential effects of releasing it.
- The public authority needs this information to ensure that it does not release information inappropriately or unlawfully,
28. For further information please refer to the briefing notes prepared by the House of Commons Library. (*Standard Note SN/PC/2950, Freedom of Information requests; Research Paper 04/84, Freedom of Information implementation*).
29. A copy of guidance prepared for public authorities by the Information Commissioner, from which some of the contents of this note has been drawn, is available on the parliamentary website (link below). Also available at the same location is a copy of a letter sent by the Commissioner to all

Members, which summarises the main points including the need for public authorities to protect personal information and to consult Members. Members might find it useful to provide copies of this letter and guidance to public authorities which are dealing with requests for correspondence.

Contact

Advice on freedom of information and data protection matters is available from the Head of the Information Rights and Information Security Service, x2032.

Guidance and Letter

www.parliament.uk/site_information/foi/foi_general/commons_foi/commons_foi_guidance.cfm.

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